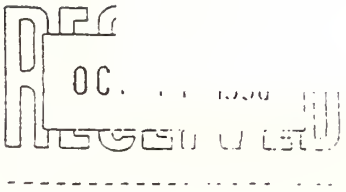
#399

Decision #90-013



The Human Rights Code, 1981, S.O. 1981, c. 53, as amended

In The Matter Of The Complaint made by Giansaroop Persaud, alleging discrimination in employment on the basis of race, colour, ancestry, place of origin, ethnic origin, harassment and reprisal by Consumers Distributing Ltd. and its servants and agents, and Cliff St. Pierre;

And In The Matter Of The Complaint Made by Mr. Devinder Bhardwaj, alleging discrimination in employment on the basis of race, colour, ancestry, place of origin, ethnic origin and harassment by Consumers Distributing Ltd. and Mr. Gary Dassy.

Before: Peter A. Cumming, Q.C.
Board of Inquiry

Appearances: Dennis Brown, Q.C., Mr. John Zarudny, and Ms. G. Sanson for the Ontario Human Rights Commission;

Ms. Barbara G. Humphrey, Mr. Lee Shouldice, and Ms. G. Anand for the Respondents Consumers Distributing Ltd. and Cliff St. Pierre; and

Mr. Kalmen Goldstein for the Respondent Mr. Gary Dassy

Introduction

This Inquiry involves two Complaints under the Human Rights Code, 1981, S.O. 1981, c. 53, as amended (hereafter, the "Code"). There was a great deal of evidence, comprising 65 volumes and 155 exhibits. The Complainant, Mr. Ghiansaroop Persaud (also known, and hereafter referred to, as "John Persaud") alleges discrimination in employment on the basis of race, colour, ancestry, place of origin, ethnic origin, harassment and reprisal by the corporate Respondent, Consumers Distributing Ltd. (hereafter, "Consumers"), and by Cliff St. Pierre, Vice-President, Human Resources, of the corporate Respondent at the relevant times (Exhibit #3, later amended, Exhibit #6).

Mr. Maurice Melnychuk was also named as an individual Respondent in the Persaud Complaint but he was later deleted as a party (Evidence, vol. V, pp. 1, 2).

The Complainant, Mr. Devinder Bhardwaj, alleges discrimination in his employment with Consumers on the same prohibited grounds, and harassment. The Bhardwaj Complaint also names Mr. Gary Dassy as an individual Respondent (Exhibit #4, amended Exhibit #5).

Respondents raised preliminary issues of procedure. The main one was that the two Complaints should not be combined and dealt with in the same hearing (see Evidence, vol. 1, p. 18; vol. 2; section 31(3) of the Code). I held that joinder of the Complaints in a single hearing was appropriate (Evidence, vol. 2, pp. 52-53).

The Bhardwaj Complaint

Devinder Bhardwaj, age 30, was born in India of East Indian racial origin, and later came to Canada as an immigrant. He began his employment with Consumers in July, 1980, as an assembler in the order assembly department in Consumers' distribution warehouse at 6700 Northwest Drive in Mississauga, Ontario. He also became a member of Local 419 of the Teamsters Union, the labour force having been organized about 1977 with the certification of the Teamsters Union. In 1982 Mr. Bhardwaj was promoted to the position of machine operator, operating a "long john" machine, delivering materials within the warehouse. He continues to work as an employee with Consumers as of the conclusion of the Inquiry.

Mr. Bhardwaj had no problems relevant to the issues raised in his Complaint until September 3, 1982 when he asked the individual Respondent to his Complaint, Mr. Garry Dassy, a fellow employee at Consumers (whom he had come into previous contact with, without incident) a question after coming into a supervisor's-office, suggesting to Mr. Dassy that he was mixing up merchandise as between two retail stores in the loading of a trailer. Mr. Bhardwaj realized Mr. Dassy was apparently upset about something else at the time and not in a "good mood", and Mr. Bhardwaj left the office. Mr. Bhardwaj testified that Mr. Dassy followed him for a few feet and referred to him as a "Paki" and told him he did not know how to work. Mr. Bhardwaj testified Mr. Dassy then threw a hard hat, hitting him in the lower back, and grabbed his left arm.

Mr. Bhardwaj testified that he reported this incident a few minutes later to a shipping supervisor, Mr. Francis Loder, in the presence of Mr. Dassy who again referred to Mr. Bhardwaj as "Paki", and who threatened to hit him again. Mr. Loder took Mr. Dassy from the office to cool him down, told Mr. Bhardwaj to see a doctor, and requested a written report from Mr. Bhardwaj about the incident, which Mr. Bhardwaj gave (Exhibit #7). Mr. Bhardwaj testified that it was necessary to stay off work for some four weeks, on the advice of his physician (Exhibit #12). He received workmens' compensation for the 22 days he missed at work (Exhibits #8 and #10).

Mr. Bhardwaj did not immediately complain of an injury after the hard-hat assault, and when he did go to the hospital that day, the initial diagnosis was that he could return to work with light duty for a few days (Exhibit #10). Mr. Bhardwaj saw his family doctor the next day and was then away for three weeks, and when he then returned September 27 without a doctor's note, (a note being required by Consumers) he telephoned his physician who, without seeing him, apparently told him to take a fourth week off work. Mr. Dassy was placed on a indefinite suspension on September 3 because of the incident (Exhibits #18, #19), being requested to return September 9 so that the investigation could be completed, with Consumers stating that it reserved the right to take disciplinary action.

Mr. Bhardwaj returned to work October 4, 1982. He testified that on October 5 Mr. Dassy again called him "Paki" and threatened

to kill him. Mr. Bhardwaj called the police, who attended at the warehouse and spoke with Mr. Dassy. The police told Mr. Bhardwaj he could lay a private complaint which he tried to pursue with a justice of the peace but was told he lacked witnesses. On October 6, 1982, Mr. Dassy again referred to Mr. Bhardwaj as "Paki" and made threatening gestures. That evening Mr. Dassy stopped in front of Mr. Bhardwaj's car in the parking lot, appearing to write down his licence plate number. Mr. Bhardwaj said Mr. Dassy again made threatening gestures October 7 and 8, 1982. Mr. Bhardwaj said he asked a foreman, Bernard St. Croix, for protection in the parking lot, mentioning the threatening gestures and the taking of the licence plate number. On the evening of October 12, 1982 Mr. Dassy kicked Mr. Bhardwaj at the time clock. Mr. Bhardwaj reported this incident to the police, who attended at Consumers' warehouse.

Mr. Bhardwaj went to the hospital and returned with "just a bruise" (Exhibit #30) but after seeing his family physician, was then off work for four days, returning to work October 18. A medical report (Exhibit #29) was filed. Mr. Bhardwaj received workmen's compensation.

There was an investigation (Exhibit #104) by Consumers of the October 5, 1982 incident in which Mr. Bhardwaj had alleged that Mr. Dassy had threatened him and had again used a racial slur, and an investigation in respect of the October 12, 1982, kicking incident (Exhibit #105). Management of Consumers did try to identify witnesses for the police investigation of the October 12 incident but the four persons named as possible witnesses at the time

(Exhibit #27) apparently could not offer any corroboration of Mr. Bhardwaj's version. Mr. Dassy denied the accusations.

Mr. Bhardwaj had only returned to work on October 4 after the September 3 incident (other than when he returned for a few hours September 27, when he called his doctor and was told to take a further week off), so that the company, understandably, saw the October 5 and 12 incidents as a continuation of the dispute between Mr. Bhardwaj and Mr. Dassy that had commenced September 3 (Exhibit #27). Management, through Mr. Wayne Dobson on Oct. 5, 1982, had advised Mr. Dassy and Mr. Bhardwaj to settle their differences and avoid each other (Exhibit #104).

In respect of the September 3, 1982, incident the supervisor had made Investigation Reports (Exhibits #9 and #11) and Mr. Loder made reports (Exhibits #13, #14, #15 and #16) and a statement was taken from Mr. Dassy (by Mr. Harvey Campbell - the shift manager - Exhibits #17, #18; a letter was sent to Mr. Dassy from Mr. Dave Rose, the manager of shipping for Consumers - Exhibit #19; and internal memos to and from Mr. Rose were prepared in respect of the matter - Exhibit #20 and #21). These reports of management confirmed Mr. Bhardwaj's version of events in respect of the September 3, 1982 incident.

Mr. Bhardwaj was asked to come to a meeting October 18, 1982, to resolve the problem, together with Mr. Dassy, and management officials, being Maurice Melynchuk, Wayne Dobson, Brian Wicks and Dave Rose. As October 18 was the first day that Mr. Bhardwaj returned to work following upon the October 12, incident,

management dealt with the matter on the first day that both Mr. Dassy and Mr. Bhardwaj were back at work. Mr. Dassy and Mr. Bhardwaj were given a memo that their behaviour was unacceptable (Exhibit #26) and they were asked to shake hands, which they did. Mr. Bhardwaj was unfortunately and incorrectly put in the position of fearing disciplinary action by the company if there were further confrontations with Mr. Dassy (Exhibit #26). Although management directed a generalized criticism at both Mr. Dassy and Mr. Bhardwaj, it is clear that management considered Mr. Dassy to be the main problem. He was the only one disciplined. Mr. Dassy had told managment that Mr. Bhardwaj had called him names in connection with the September 3 incident.

Mr. Dassy received a three day suspension, and filed a grievance (Exhibit #22). Documents were filed pertaining to the grievance (Exhibits #23 and #24). Mr. Dassy was expressly criticized for his "abusive conduct" and for "making racial slurs" and advised that this "behaviour is unacceptable and will not be tolerated" by Consumers (Exhibit #23). Mr. Melynchuk advised Mr. Persaud at the second step of the Dassy grievance that management found "there is more evidence supporting Mr. Bhardwaj's side of the story".

Mr. Bhardwaj did not have any problems with Mr. Dassy after October 12, 1982.

Up to the date of the Complaints, Consumers' work force at the warehouse consisted of a significant number of employees who were drawn from visible minorities. Although precise figures were not

ossible, almost 50% of the work force of 243 persons working in all departments was from visible minorities (Exhibit #145).

There were, clearly, serious labour problems at Consumers. There was evidence of a strike in 1981 which included violence and damage to Consumers' property and to the cars and homes of some management personnel (Exhibit #108). There was an illegal strike in 1983. There were significant changes in management personnel over the period. The evidence in the Inquiry suggested that historically Consumers' senior management had treated its work force at the warehouse with little respect and with a minimum of concern for their welfare. Whatever the reasons, the working environment at the distribution warehouse historically seems to have generated considerable friction between the work force and management. However, all of these historical problems seem to have been largely rooted in labour problems.

In 1983, as the result of a settlement in a human rights complaint of an employee, Althus Lewis, on the initiative of management, a race relations committee was to be established. However, nothing came of this, but this seems to be as much because of the indifference of the union as because of Consumers. It was management's view that some disciplined employees were unjustifiably utilizing the Human Rights Commission after being unsuccessful through the grievance and arbitration route. Management also felt that some employees would pursue human rights complaints with false allegations to extract a money settlement, knowing that the company might settle for an amount rather than

face significant costs in defending a complaint through a hearing.

There were five human rights complaints pre-1980, only one of which apparently was proceeded with by the Commission. In the 1980's there were apparently five complaints, including the two before this Board of Inquiry. Of the other three, two were withdrawn or rejected and one (the Althus Lewis complaint) was settled.

There is sometimes graffiti on washroom walls and racial name-calling (including between employees of different visible minorities) at Consumers. At least two employees had been disciplined for racial name-calling - Mr. Willy Platt and Mr. Ahamed Khan.

Mr. Sean Floyd, president of the union at the relevant times felt there were "racist overtones" at Consumers, but at the same time was of the "...strong conviction that Mr. Persaud was terminated [in respect of his employment] because of his labour activities".

There was an illegal strike in 1983, but in terms of discipline in respect of this matter there was no differentiation between employees of visible minorities and other employees. There were problems over the issue of the introduction of new production standards, but of the seven employees terminated for their performance in this regard, six were white.

Only two employees (other than the Complainants) gave any evidence suggesting they had been subject to racial slurs. One,

Mr. Ahamed Kahn, testified that Mr. Dassy once called him a "dumb Jamaican". Mr. Kahn was himself terminated as an employee for making racial slurs. The other, Mr. Joel Armoogan, testified that on one occasion Mr. Dassy said he would "kill the ... Paki".

A workplace of this size and nature undoubtedly has disputes between employees, and disputes between employees and supervisors and managers, and the adversarial nature of the unionized workplace brings management and the union stewards into conflict from time to time. With a workforce of about 50% from visible minorities, and well over 200 employees in total, there are going to be a number of disputes between persons of different racial origins rooted simply in labour matters.

All of the factual situations of the disputes in the warehouse raised in evidence were work-related and labour issue-specific in origin, although some (in particular, the incidents involving Mr. Dassy and Mr. Bhardwaj) also took on a racial aspect.

Mr. Bhardwaj alleges discrimination in contravention of subsections 4(1) and 4(2) of the Code. However, the evidence all related to the harassment of Mr. Dassy toward Mr. Bhardwaj, and given the express language of subsection 4(2), the single, real issue is whether there was a breach of that subsection. There was no evidence to support a conclusion that there was any contravention of section 4(1) of the Code in respect of Mr. Bhardwaj.

Section 9(f) of the Code defines "harassment" as "engaging in a course of vexatious comment or conduct that is known or ought

reasonably to be known to be unwelcome...".

The incidents in question arose out of a work-related dispute between Mr. Bhardwaj and Mr. Dassy. Mr. Dassy took exception to Mr. Bhardwaj's questioning and criticism of Mr. Dassy's work procedures in loading trucks on September 3, 1982. They had worked together for a few years to this point in time without apparent problems.

Mr. Dassy is a very volatile individual who retaliates quickly and forcefully against anyone who crosses his path. He is a short-tempered, aggressive bully who will retaliate verbally, and even physically, against anyone, whether white or non-white who challenges him. The totality of the evidence indicates that Mr. Dassy would get into disputes with other employees, but as often with caucasian as with non-white employees. When he thinks he is being challenged or criticized, or crossed in any way, then he retaliates - often physically and violently. His motivation in his fights with fellow employees when he was employed at Consumers was not one of racism; rather, the fights would be triggered by specific issues arising that were work-related. But his expressions in such fights would include derogatory racial epithets and name-calling as one means of belittling and humiliating the opposition when the opponent was a member of a visible minority.

When Mr. Bhardwaj crossed Mr. Dassy's path, a feud ensued. It is clear from all the evidence, as Mr. Dassy allowed in his own evidence, that if anyone crosses him he reacts by going in "for the kill".

Mr. Dassy's actions, clearly reprehensible and unacceptable, were rooted in the dispute over work methods. Mr. Dassy's motivation in his actions with respect to Mr. Bhardwaj were not racial in origin. They had worked together for some time without incident. However, Mr. Dassy was challenged by Mr. Bhardwaj's criticism of his work methods September 3. When Mr. Dassy gets into a disagreement, he attacks with all he can muster. In the instant situation he assaulted Mr. Bhardwaj twice physically, once by throwing his hard hat and a second time by kicking him. Mr. Dassy also threatened Mr. Bhardwaj with violence, attempting to intimidate him. Mr. Dassy denied the assults and threats, but his denials were not credible. I accept Mr. Bhardwaj's evidence in respect of their altercations. When Mr. Bhardwaj returned to work (having been absent from September 3, 1982 to October 4, 1982), Mr. Dassy immediately resumed the feud October 5, 1982 and continued it until October 12, 1982. Clearly, these assaults were unacceptable and reprehensible. Indeed, they were criminal acts.

As well, in responding to Mr. Bhardwaj, Mr. Dassy used racial slurs in attempting to demean Mr. Bhardwaj, and to intimidate him and to get even by hurting his feelings.

While Mr. Dassy's motive for his actions and words was not racially-based, his words and actions clearly had an active racial component. One operative factor in Mr. Dassy's treatment of Mr. Bhardwaj was Mr. Bhardwaj's race, colour, ancestry and place of origin. Racial harassment is present when one person verbally

insults another person on the basis of his race, colour, ancestry and place of origin, irrespective of the underlying events that trigger the outburst. Such harassment is contrary to section 4(2) of the Code and Mr. Dassy is in breach of that provision.

When derogatory racial references are used between employees in the context of a heated argument or a specific dispute that is work-related and unrelated to race, as an expression of anger and frustration, such racial references constitute racial harassment. The Samual Nimako v. CN Hotels (1987) 8 C.H.R.R. D/3985 (Ont. Board of Inquiry: H.A. Hubbard) case, cited by the Respondents, is distinguishable on the facts because in that case the racial slur was not said to the complainant (D/4005, para. 31693).

Mr. Dassy's physical assaults, and his verbal assaults through his verbal racial harassment, are both unlawful and morally reprehensible. Such actions are completely unacceptable conduct in any civilized society.

My inference from all of the evidence regarding the physical assaults is that the injuries, while certainly real, did not result in Mr. Bhardwaj being unable to work for the lengthy periods of time he took off work. My inference from all the evidence is that Mr. Bhardwaj used his injuries as an excuse to be off work to some extent while receiving workmens' compensation. This circumstance does not in any way excuse or lessen the gravity of Mr. Dassy's unlawful and reprehensible actions; however, it is simply to point out, in my view, that Mr. Bhardwaj's injuries were not as severe as he claimed.

The question then is - is Consumers responsible for this breach of the Code by Dassy, a labourer in the distribution wharehouse, that is, a mere employee who is not part of management or the "directing mind" of the corporate employer?

The Supreme Court of Canada has commented upon the matter of employer liability in Bonnie Robichaud and Canadian Human Rights Commission v. Her Majesty the Queen, as represented by the Treasury Board (1987) 8 C.H.R.R. D/4326. In that case, it had been held that the Complainant had been sexually harassed by her superior in contravention of section 7 of the Canadian Human Rights Act, S.C. 1976-77, c. 33, as amended. The issue was whether the corporate employer, the Department of National Defence, of the two individual protagonists was responsible for the unauthorized discriminatory acts of the employee supervisor in the course of employment.

La Forest, J. reviewed the purpose of the Act as set forth in section 2 thereof, being to give effect to the principle of equal opportunity to individuals without being hindered or impeded by discrimination. He emphasized that "the Act must be so interpreted as to advance the broad policy considerations underlying it ... [through] such fair, large and liberal interpretation as will best ensure the attainment of the Act's objectives." (p. D/4339)

The purpose of human rights legislation is remedial, "to eradicate anti-social conditions without regard to the motives or intention of those who cause them". (p. D/4330) La Forest, J. stated that a theory of employer liability, therefore, did not have to be based upon fault, nor based upon vicarious liability

developed under the law of tort with its restrictive approach as to when an employee's acts are in the course of the employee's employment. (at pp. D/4330, D/4331) The Act is "not aimed at determining fault or punishing conduct", and the "remedial objectives of the Act would be stultified" if the remedies available under subsections 41(2) and (3) were not available against the employer for employment-related discrimination irrespective of fault on the part of the employer. (at pp. D/4331, D/4332).

> "[O]nly an employer can provide the most important remedy - a healthy work environment." (p. D/4333).

La Forest, J. also stated that "the education objectives" embodied in the Act would be vitiated if an expansive approach to employer liability was not taken (p. D/4333).

La Forest, J. therefore concluded:

> Hence, I would conclude that the statue contemplates the imposition of liability for all acts of their employees "in the course of employment" interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions". (p. D/4353)

The theory of employer liability articulated by La Forest, J. would seem to mean that employers are always liable for unlawful discrimination by their employees, even where those acts of discrimination are committed by mere servants (ie. non-management

and non-supervisors) against fellow servants and which are unknown to management. Clearly, where there is discrimination by non-management, and the acts of discrimination of the mere employee are known and approved of or condoned by management, then management itself is discriminating by allowing the discriminatory acts to create a poisoned work environment or to be a condition of employment. In such instances, the employer itself is discriminating because of the management's acts.

However, what about the situation when a mere employee unlawfully discriminates through racial harassment, but the acts of discrimination are not known and approved of or condoned by management? Is the employer itself in breach of the Code in such a situation? La Forest, J.'s. theory would go further than the "organic theory of corporate responsibility" articulated elsewhere - see Cindy Cameron v. New-Gor Nursing Home et al (1984) 5 C.H.R.R. D/2170 at paras. 18512 to 18520 (Ont. Board of Inquiry: P.A. Cumming). For the organic theory to be operative, the wrongdoer must be part of the "directing mind" of the employer corporate entity, and the offending acts must occur in the course of carrying on the employer's business. As sexual harassment situations commonly involve a supervisor or person otherwise in authority abusing that authority, as in Robichaud, the criteria of the organic theory would often be met in any event. Interestingly, after making the statement quoted above, La Forest, J. immediately quotes with approval remarks by Marshall, J. in his concurring opinion in the United States Supreme Court decision in Meritor

Savings Bank v. Vinson, 106 S. Ct. 2399 (1986) at pp. 2410-11 concerning discrimination, which remarks seem limited to supervising personnel, that is, persons who would fall within the directing mind category.

La Forest, J.'s interpretive approach in respect of the federal Act accords with that taken generally by the Ontario Legislature in subsection 44(1) of the new Code. By subsection 44(1), a discriminatory act by any mere employee "in the course of employment" renders the employer vicariously liable, except in "harassment" situations (subsections 2(2), 4(2) and section 6) which are expressly excepted from the operation of the subsection.

Thus, under the Ontario Code, unlike under the federal Act as interpreted by the Supreme Court of Canada in Robichaud, there is not vicarious liability in harassment situations. Therefore, in respect of Ontario human rights law the organic theory of corporate responsibility remains very pertinent in harassment situations.

> "If it is a situation of sexual harassment by a mere employee (ie. not someone who is part of the directing mind) of the corporate employer, then by virtue of the excepting provision in subsection 44(1) vicarious liability does not attach to the employer. However, if the employee sexually harassing is part of the directing mind of the employer, then while subsection 44(1) does not apply (ie., there is no deeming of the discriminatory act of the employee to be the act of the employer) there can be personal liability on the part of the employer on the theory as advanced ... (Cameron, supra at 17,008).

Why did the Ontario legislative except "harassment" from the operation of the new vicarious liability provision - sub-section 44(1)? One can only speculate. Perhaps the Legislature was of the view that vicarious liability for non-harassment discrimination is

fair, because it typically is seen through business decisions and practices that ought to be known and guarded against: for example, hiring practices, membership rules, and methods of providing services. However, harassment is less predictable in respect of specific employees, and less preventable in the relative sense. Perhaps the concern is that an employer can and should always be familiar with its business practices, for example, the application forms prepared by its staff, but even with educational and preventive programs and effective supervision, may encounter situations of sexual or racial harassment it cannot reasonably know about until an aggrieved employee advises the employer. When the employer is made aware of harassment, reasonable steps must be taken promptly to eradicate it. See, for example, Dolph Boehm v. National System of Baking et al (1987) 8 C.H.R.R. (Ont. Board of Inquiry: P.A. Cumming).

It remains to mention subsection 40(4) of the new Code, which reads:

> (4) Where a board makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2(2) or subsection 4(2) or conduct under section 6, and the board finds that a person who is a party to the proceeding,
>
> (a) knew or was in possession of knowledge from which he ought to have known of the infringement; and
>
> (b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,
>
> the board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 35(2), request

> the board to re-convene and if the board finds that a person who is a party to the proceeding,
>
> (c) knew or was in possession of knowledge from which he or she ought to have known of the repetition of infringement; and
>
> (d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,
>
> the board may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.

What does the inclusion of this statutory provision suggest? Someone might suggest that, coupled with subsection 44(1), subsection 40(4) means that the powers conferred upon a board of inquiry set forth therein offer the only remedies available in respect of an employer in a harassment situation. Clearly this is not so. All the remedies generally available under the Code are available in respect of a harassment situation. See generally Cameron, supra at paras. 18521 to 18563. I interpret subsection 40(4) as merely a statutory vehicle for allowing the same board as heard a first harassment complaint to deal with subsequent harassment problems following upon its initial decision and order. Harassment situations are often in particular need of on-going scrutiny, as seen in a board of inquiry order under the old Code, R.S.O. 1970, c. 318, as amended, in respect of a finding of racial harassment in the workplace: S.S. Dhillon v. F.W. Woolworth et al (1982) 3 C.H.R.R. D/743 at paragraphs 6725 to 6728 (Ont. Board of Inquiry: P.A. Cumming). The order in that case would have been facilitated if subsection 40(4) of the new Code had been present

in the old Code.

For Consumers to be liable for Mr. Dassy's harassment, management must have had actual knowledge of it or should reasonably have had knowledge. Secondly, Consumers must have failed to reasonably act upon such knowledge, such that it can be said Consumers approved of or condoned such acts of discrimination with the result that management allowed a poisoned work environment to be created or the discriminatory acts to be a condition of employment.

Prior to September 3, 1982, the date of the initial Bhardwaj - Dassy encounter, there was nothing to suggest to management that Mr. Dassy engaged in racial harassment or discrimination (Exhibit #111).

Mr. Joel Armoogan testified that he had had an incident with Mr. Dassy, in 1980, which had a racial element, but Mr. Armoogan's statements in 1980 at the time of that incident (Exhibits #98, #99) do not suggest in any way a racial element. As for the Bhardwaj - Dassy dispute itself, Mr. Bhardwaj characterized it to management and at this hearing as being essentially work-related. Mr. Bhardwaj referred to Dassy as being "...in a bad mood" and attributed his actions to the fact "I criticized his work". His statement to management (Exhibit #15) attributed the problem to the workplace-related dispute and that Mr. Dassy was "mad" and "in pain" from a back injury Dassy was suffering from.

In the instant situation, Consumers had knowledge of the September 3 physical assault with the hard hat and the use of the

racial slur. Management did investigate (Exhibit #7, #9, #14, #16) and determined that Mr. Bhardwaj's criticism of Mr. Dassy's manner of truck-loading was justified. Mr. Bhardwaj's views on the altercation were accepted. Consumer's suspended Mr. Dassy pending completion of their investigation (Exhibit #13) and when this was done he was suspended for three days without pay (Exhibit #18, #19, #21). Mr. Dassy then grieved his discipline, being supported by the union and, indeed, by Mr. Persaud, in his capacity as Chief Steward (Exhibit #24).

Where an employer has knowledge, either actual or constructive, of racial harassment, reasonable steps in the circumstances must be taken to remove such harassment. See Simms v. Ford of Canada (June 4, 1970 Ont. Board of Inquiry: H. Krever); Fuller v. Candur Plastics Limited (1981), 2 C.H.R.R. D/419 (Ont. Board of Inquiry: R.W. Kerr); S.S. Dhillon v. F.W. Woolworth Company Ltd. (1982), 3 C.H.R.R. D/743 at para. 6724 (Ont. Board of Inquiry: P.A. Cumming); Ahluwalia v. Toronto Board of Commissioners of Police and Dickson (1983) 4 C.H.R.R. D/1757 (Ont. Board of Inquiry: P.A. Cumming); Samuel Nimako v. CN Hotels (1987) 8 C.H.R.R. D/3969 at para. 31695 (Ont. Board of Inquiry: H.A. Hubbard); Avtar Singh and Domglas Limited (1981) 2 C.H.R.R. D/285, paras. 2525 to 2530 (Ont. Board of Inquiry: R.W. Kerr); Emilda Shaffer v. The Treasury Board of Canada (1984) 5 C.H.R.R. D/2315 (Federal Review Tribunal: P.L. Mullins, S. Acheson, S. Joanisse) paras. 19518 to 19525.

Mr. Bhardwaj alleges that Mr. Dassy made slurs and threatening

gestures October 5, 6, 7 and 8, 1982, but he did not report this to management until about 9:30 p.m., Friday October 8, nor did he present the problem to management as being essentially of a racial nature. The final incident, involving the kick at the time clock, occurred the next working day, October 12 (October 9, 10 and 11 being holidays). Mr. Dassy denied the kicking allegation. While employees did not come forward to substantiate the kicking incident, a more-thorough investigation would have found witnesses who would have confirmed Mr. Bhardwaj's allegation. Mr. Terry Collins and Mr. Malcom Freake, witnesses at the Inquiry, confirmed Mr. Bhardwaj's evidence in respect of the kicking incident. However, the Company did speak with the four persons Mr. Bhardwaj had suggested at the time of the investigation as possibly being witnesses, Peter Hart, Mary Edwards, Randall Lewis and Hardip Khinda, but apparently they could offer no help.

In their investigation, when Mr. Dobson asked Mr. Bhardwaj as to why Mr. Dassy had kicked him, Mr. Bhardwaj replied that he did not know (Exhibit #28 and #30). Mr. Bhardwaj wanted management to get Mr. Dassy and himself together to settle their differences, and this was done October 18, the first day the two were both back at work. Mr. Bhardwaj had been off work for the four days following the October 12 altercation. Management, therefore, dealt with this incident, and the incidents of the previous week, on the first day that both Mr. Dassy and Mr. Bhardwaj were at work together, being October 18, 1982. They then continued to work together thereafter, without any further incidents.

Management of Consumers had knowledge of the racial slurs used by Mr. Dassy on September 3 and October 5, as reported to management, but management did not authorize, condone, adopt or ratify these actions of harassment. Management disciplined Mr. Dassy in respect of the September 3 incident and brought the two employees together quickly on October 18 to resolve the continuing feud as evidenced by Mr. Dassy's conduct toward Mr. Bhardwaj after Mr. Bhardwaj's return to work October 4. Clearly, the situation of racial name-calling in respect of the Bhardwaj - Dassy situation did not become a condition of employment permitted by the employer. Rather, it was a personal matter between the two employees, and it was ended by the intervention of management. Consumers is not in breach of the Code because of the racial harassment by Mr. Dassy of the Complainant Mr. Bhardwaj, in the instant situation.

One can argue that Consumers' discipline in respect of Mr. Dassy should have been more severe in the circumstances, but that is simply a judgment call. Indeed, the union supported Mr. Dassy's assertion that the discipline was too severe.

The Persaud Complaint

The Complainant, John Persaud, was born in Guyana and is of East Indian racial origin. He emigrated to Canada, and commenced employment with Consumers in 1974. He became Chief Steward for the union at Consumer's warehouse in 1977.

Mr. Gary Dassy is not an individual Respondent in respect of the Persaud Complaint. However, in respect of the main issue in that Complaint, the question of the termination of Mr. Persaud's employment, Mr. Dassy played a very material role. It was Mr. Dassy's statement to management that resulted in Mr. Persaud's termination May 29, 1984. Was Mr. Dassy motivated in part by racism? If so, did management have knowledge of this motive? Was management itself motivated by racism?

As related above in discussing the Bhardwaj complaint, the evidence indicates clearly that Mr. Dassy would threaten, harass, have altercations with and even assault, anyone who appeared to challenge him or even just looked at him the wrong way. Mr. Dassy had altercations with Mr. Ed Faultless, a caucasian, on more than one occasion. He had a verbal altercation with Mr. David Underhay, another caucasian, when Mr. Underhay made disparaging remarks about Mr. Dassy's loading. Mr. Winston Bennett had a verbal run-in with Mr. Dassy. Mr. Dassy initiated a fight with Mr. Ahamed Kahn in the company's parking lot because Mr. Kahn called him a "fink" in connection with a workplace dispute over Mr. Dassy working up to standard. Mr. Kahn, of a visible minority, did not suggest this incident was racially motivated. Bernie Bascombe, another employee

who is of a visible minority, testified that Mr. Dassy could be a very serious problem for his fellow workers, but did not suggest it had a racial basis.

Mr. Dassy sometimes on occasion used racial slurs in conversation, not directed at a specific person, as stated by Mr. Kahn, Mr. Armoogan, Mr. Bertie Rose, and Mr. Munro, but this was never reported to management. As related above in respect of the Bhardwaj Complaint, Mr. Dassy racially harassed Mr. Bhardwaj in the context of their work-related dispute.

There was no evidence that Mr. Dassy had ever directed a racial slur at John Persaud. There was a physical altercation between Mr. Dassy and Mr. Persaud at a time clock in 1980, but that incident does not appear to have had a racial element to it. Between 1980 and May 25, 1984, there was no evidence of problems between Mr. Dassy and Mr. Persaud. Mr. Dassy did use racial slurs in the washroom, in the absence of Mr. Persaud, to describe Mr. Persaud to Mr. Faultless and Mr. Rose at the time of the dispute between Mr. Dassy and Mr. Persaud May 25, 1984 which led to Mr. Dassy making a statement to management that in turn led to the termination of Mr. Persaud's employment May 29, 1984.

<u>The Allegations of Discrimination Beyond the Termination of Employment Issue</u>

Paragraphs 2 to 8 of the Persaud Complaint deal with alleged incidents relating to discrimination beyond the main issue, being the termination of Mr. Persaud's employment.

Paragraph 2 suggests that there were never any problems with John Persaud's work performance or his personal conduct. In fact, there were serious problems with his work performance and personal conduct. Mr. Mike Gietka, of Consumers' management, testified that Mr. Persaud had more accidents, some 13, than any other worker over a five year period (Exhibit #74). Mr. Persaud was disciplined for not reporting some, rather than for having the accidents, as Mr. Persaud asserted (see Exhibit #41).

Mr. James Crawford, Mr. Persaud's supervisor in the order assembly department where Mr. Persaud worked, described Mr. Persaud as "disruptive [and] counter-productive", who could not keep his mind on his work, and that 3 1/2 to 5 hours a day were spent by Mr. Persaud on union duties and in chatting with other employees. Several management witnesses, including Mr. Mike Lavis and Mr. Mike Gietka, and a fellow worker and union official, Glen Lyons) testified that Mr. Persaud spent a considerable part of his time socializing or doing union business. Mr. Persaud categorically denied this in his own testimony but his evidence was not credible.

Mr. Persaud was disciplined (Exhibit 39), for driving a reach truck without a licence (Exhibit #70); and was suspended on another occasion for refusing to follow the instructions of his foreman and supervisor to work with another, junior, employee who was the "lead hand" (Exhibit #71). Mr. Persaud was suspended for refusing to drive a particular tugger, on the alleged basis of his professing religious reasons in that he said he felt the tugger was

regarded Mr. Persaud as disruptive and confrontational.

Even Bernard Bascombe, a fellow worker and supporter of Mr. Persaud, attributed much of the conflict between Mr. Persaud and the company and the union to the manner in which Mr. Persaud conducted himself. Mr. Bascombe, while an appreciative supporter of Mr. Persaud's zelous efforts as a union steward, anticipated Mr. Persaud's termination because he was so tenacious with management and was always filing grievances.

Even allowing for the unfortunate adversarial approach that generally underlies the conflict-based North American style of labour relations, Mr. Persaud's personal conduct went far beyond the norm.

Mr. Persaud would not waiver from his position or views about the interpretation of the collective agreement, after an arbitration in which the union lost. His stubborn and uncompromising conduct as a union steward, and his abuse of that position in terms of his personal conduct and in his manner of filing grievances, caused considerable conflict.

The Collective Agreement (Exhibits #60 and #79) is clear in Article 5.06 in requiring that all grievances provide for "full particulars". Mr. Persaud would ignore this requirement, abusing the process, and try to overwhelm the company with a multitude of grievances on general policy issues and statements (see Exhibits #34, #35, #38, #62, #64, #65, #66, #68 and #69). Mr. Persaud would ignore requests for particulars. Some grievances would have no plausible basis. He would also file individual grievances as

policy grievances. For example, one grievance (Exhibit #35) filed as a policy grievance, would only affect a single individual, being Mr. Persaud himself, which he admitted only after lengthy cross-examination.

On occasion, being dissatisfied with management's position at meetings, Mr. Persaud would just walk out (Exhibit #61). He would sometimes insist that grievances proceed right to the third step, ignoring the first two. He would also refile unsuccessful grievances over and over again, if he was unsuccessful in the first instance.

The company introduced new standards for employees. The union arbitrated the reasonableness of the standards and lost. It was clear from all the evidence that Mr. Persaud never accepted the decision in this arbitration.

The company introduced a light duty program, with union support, for injured workers which would have benefited both the company and workers but it was abandoned in the face of Mr. Persaud's grievance that the program would technically violate the seniority requirements of the Collective Agreement.

I accept the evidence of the management and union witnesses as to Mr. Persaud's behaviour. His demeanour and testimony at the hearing only confirmed their criticisms. He would often not be responsive to questions, would wander off topic on tangents when confronted with a question he did not want to answer, and would be unduly argumentative. He adopts a self-righteous posture, counter-attacking with irrelevancies and rhetoric, when put in a defensive

position. He can not admit that he might be wrong. He is not credible and will say whatever seems convenient. His evidence had a chameleon-like character, adopting itself to fit the demands of the immediate environment. His self-righteous stubbornness in completely denying any shortcomings whatsoever on his part served to confirm the extreme frustration that management and union officials would have in dealing with him.

There can be no dispute that management had no respect for Mr. Persaud as the Chief Steward or as an employee. However, management's lack of respect was due to Mr. Persaud's conduct and behaviour, not due to his race, colour, ancestry, place of origin or ethnic origin.

Paragraph 3 Allegations

Mr. Persaud suggested in his Complaint that Consumers' management preferred to deal with white union officials. There was considerable evidence relating to various alleged incidents. However, there was no substance to these allegations, based simply on vague suggestions founded upon supposed hearsay. Management did not refuse to deal with Mr. Persaud as Chief Steward, though they did not at all respect the manner in which he performed his responsibilities. To the extent that any of these alleged incidents had any factual basis, these was no racial motivation present in respect of the incidents. The evidence of other union representatives, tended to support management in this regard.

Paragraph 4 of the Complaint

Mr. Persaud alleged that he was unfairly treated in respect of overtime because he was classified as a tugger operator rather than a general labourer (Exhibit #52), and that he was unfairly given work that involved heavier items or busier workplaces, than others. His classification complaint was grieved in the first instance, but abandoned by his union. His position on the issue was confusing and lacked any meaningful basis. Moreover, when the company offered to reclassify Mr. Persaud as a general labourer (Exhibit #51), he did not respond. In fact, he was properly classified as a tugger/operator but was trying to obtain a unique benefit through overtime when it was available for both classifications. In fact, Mr. Persaud never actually signed an overtime posting under the general labour classification, even though he filed grievances (Exhibits #49 and #84) alleging he had been denied such overtime. His union did not support him, and the grievances were not arbitrated. Mr. Persaud took two complaints to the Labour Board (Exhibits #89 and #90) against his union in respect of the matter, but the complaints were dismissed. There was no real basis for any of Mr. Persaud's allegations.

Paragraph 5 of the Complaint

Mr. Persaud alleges that he did not participate in an illegal strike (which he claimed was legal) at the distribution centre in November, 1983, but claimed that management had said he would be

held responsible and fired as a "sacrificial lamb". This was denied by Mr. St. Pierre and Mr. Gietka. Mr. Gietka testified that he personally observed Mr. Persaud on the picket line during the three day strike. I accept their evidence. None of Mr. Persaud's fellow employees who testified during the Inquiry supported him on this issue.

As a result of Labour Board proceedings, a settlement was reached in respect of the strike (and signed by Mr. Persaud) with the union whereby the company was allowed to discipline up to 10 days in length, but the maximum discipline to any of the 42 employees in question was two days suspension. Mr Persaud did not receive any discipline beyond that given to other employees (Exhibit #93), and in fact was not even suspended, being only given a written warning (Exhibits #93 and #39).

Paragraph 6 of the Complaint

Mr. Persaud alleges he was assigned to the "splitting" area of the distribution centre in February, 1984, and implied this was motivated by racial reasons on the part of management. Mr. Gietka and Mr. Lavis both testified that management found it impossible to know where Mr. Persaud was on his tugger within the large expanse of the distribution centre beyond his assigned areas and that he would disappear for long periods of time to socialize or do union business. Hence, they wanted him relocated where management could better ensure that he was in fact working. As well, Mr. Lavis and Mr. Crawford testified that there was probably

less lifting in the "splitting" area than the other zones. Mr. Persaud did not argue that there was any racial motivation at the time the reassignment was made, even though he was expressly made aware of management's motivation to get a regular day's work out of him (Exhibit #45). There was no substance to this allegation in his Complaint.

Paragraph 7 of the Complaint

Mr. Persaud alleges that Mr. St. Pierre was rude to him when he approached him about the overtime issue (Exhibit #53) and had stated to Mr. Floyd that he did not want to meet with Mr. Persaud. Mr. St. Pierre denied this. As well, Mr. Floyd did not corroborate Mr. Persaud on the point. Undoubtedly, Mr. St. Pierre was generally frustrated in his dealings with Mr. Persaud and may have been abrupt with him on occasions but there was no racial motivation.

Paragraph 8 of the Complaint

Mr. Persaud alleges that Mr. Melynchuk and Mr. St. Pierre refer to workers of visible minorities as "you people". However, it seems from the evidence that while the term was used occasionally by Mr. Melynchuk, it was used simply in the sense of referring to Consumers' employees generally as a total group, and the workers within the union, in contrast to management. Moreover, Mr. Gietka, Mr. Lavis and Mr. St. Pierre all testified that Mr. Melynchuk used the term in referring to various specific groups,

being management, employees, and union stewards. The term as used was devoid of any racial connotation, and in the context it was used would be so understood by reasonable persons considering it on an objective basis.

Mr Persaud's Complaint suggested that Mr. Melynchuk had often asked Mr. Persaud his place of origin in a way such as to imply something demeaning, but there was no evidence given on this point. A few idiosyncratic comments made by some of the management witnesses in their testimony at the Inquiry were asserted as somehow being supportive of the allegations, but in reality indicated nothing.

Mr Persaud alleged that non-white employees received less discipline and had their disciplinary record removed, while other employees of visible minorities did not. The evidence was simply not supportive of these allegations. Mr Persaud's assertions were vaguely and loosely stated, often with uncorroborated heresay, and often made in an absence of any knowledge of supportive facts. On all the evidence, the discipline given by management appears to have been even-handed. Under the provisions (Article 5.16) of the Collective Agreement in force, Mr. Persaud had no right to have his record cleaned as of the date of the termination of his employment, in May, 1984. Under that provision of the Collective Agreement it is only "[a]fter a period of two years with no recorded offences" that an employee's record is stricken of all previous offences. It is clear that Mr. Persaud's disciplinary record (Exhibit #39) does not meet the requirement.

Mr. Persaud attempted to justify his assertion that his disciplinary record should have been cleaned on three or four different bases, none of which made any sense when put to the scrutiny of cross-examination. When it was shown he could not rely on the Collective Agreement he attempted to assert that a letter (Exhibit #138) sent by management to many employees, including Mr. Persaud, congratulating them upon their attendance, somehow acted to clean his disciplinary record. When Mr. Persaud's asserted rationale for his position on an issue is rendered transparent, he switches to a new asserted rationale, and when that is contradicted, he tries a third one, and so on. There was no evidence supporting Mr. Persaud's assertion that non-white employees received differential adverse treatment in respect of discipline. The totality of the evidence was to the contrary - that discipline was evenly distributed.

Mr. Persaud asserted that management and the union struck some type of secret agreement to have another union representative, Glen Lyons, rather than him, testify at an arbitration hearing (Exhibit #88). Mr. Persaud attended the hearing as Chief Steward, but was not a witness. However, the evidence indicates that undoubtedly the union made the decision not to have Mr. Persaud as a witness at the hearing, because an award by the same arbitrator shortly before in another matter (Exhibit #87) had found against the union on the basis that Mr. Persaud's evidence in that hearing was not credible, describing Mr. Persaud's recollection of events as "rather hazy". As Mr. Floyd testified, the union had "looked

pretty stupid" due to Mr. Persaud's testimony at the first arbitration. When cross-examined in this Inquiry, Mr. Persaud advanced an unbelievable rationale as to why his evidence had been rejected by the arbitrator, asserting that it was "later discovered" the "company had two [sets of] records "so as to mislead the arbitrator.

Mr. Persaud was not unfairly denied overtime, was not improperly classified, was not treated differently from any other employee because of the unlawful strike, was not improperly denied a cleaning of his disciplinary record, was not unfairly assigned to the "splitting" area of the warehouse at one point, and did not receive unfair differential treatment.

On an objective basis, all of the problems between Mr. Persaud and management can be seen to have arisen from reasons related simply to workplace and labour-related issues. The subjective impression of a person in Mr. Persaud's position, that there was a racial motivation on the part of management cannot, in itself, result in a finding of unlawful discrimination. In objective reality, whatever Mr. Persaud's impression, there was no discrimination in respect of him by management on a ground prohibited by the Code. But I would go further on the evidence and find that, in my view, Mr. Persaud does not even really hold an honest subjective belief that Consumers' management unlawfully discriminated against him. Rather, he believes management did not respect or like him as a Chief Steward and as an employee and that they were looking for an excuse to terminate his employment, which

they did. Mr. Persaud believes his termination was unjustified, and given this belief, he is prepared to assert any and all contentions possible to gain a successful award against Consumers.

Paragraphs #9 to #15 of Mr. Persaud's Complaint relate to allegations pertaining to the termination of his employment May 29, 1984. It is the termination of his employment that is the real issue in respect of his Complaint against Consumers.

The Termination of Mr. Persaud's Employment

Mr. Persaud's Complaint alleges discrimination in the termination of his employment with Consumers, alleging a breach of section 4(1) of the Code. He also alleges racial harassment in contravention of section 4(2). Finally, he alleges a breach of section 7 of the Code, which prohibits reprisals for taking proceedings under the Code. There was no evidence, or real argument made, in respect of the reprisal issue and the Complaint is dismissed in respect of that allegation. In paragraph #13 of his Complaint Mr. Persaud implies that because he received-at work a message to call someone with the Human Rights Commission May 29, 1984, that his employment was terminated later that day. In my view on all the evidence, any such phone message had nothing at all to do with the termination of Mr. Persaud's employment.

The onus is upon the Complainant to establish a prime facie case of discrimination. The critical events in respect of the termination question turn upon an altercation with Mr. Gary Dassy, a fellow employee, May 25, 1984. Mr. Dassy did not use any racial

slurs or remarks to Mr. Persaud in the context of these events.

Gary Dassy testified that John Persaud counselled him to slow down and lower his production in terms of the productivity standards. The company had introduced new work productivity standards for employees in 1983, on the advice of management consultants. Mr. Persaud denied it at this Inquiry, but the evidence was clear that he was adamantly opposed to the introduction of the standards. Many grievances were filed on behalf of disciplined employees who failed to meet the standards.

Non-compliance with, or interference with the standards, was a serious matter from management's standpoint. A considerable investment of time and resources had been made by management in achieving a viable system of standards, with a view to enhancing productivity significantly. The standards were introduced progressively. The standards had been introduced in October, 1983, with no terminations for failure to meet standards until May, 1984. A week before this incident involving Mr. Dassy and Mr. Persaud, management had terminated the employment of eight individuals (seven of whom were white) for failing to meet standards. Some 95% of the employees were able to achieve the required standards without difficulty.

Mr. Dassy had had a dispute with a fellow employee, Bertie Rose, over the manner in which Mr. Dassy was selecting goods for orders for stores, very early in the morning of May 25, 1984. Mr. Dassy was aware that Mr. Persaud had criticised his manner of selecting store orders, to management. Mr. Richard Gimza testified

that Mr. Dassy told him that it was because Mr. Persaud had complained about Dassy's "picking" (being the choosing of goods at the warehouse for loading for movement to Consumers' stores), that Mr. Dassy had gone to management alleging that Mr. Persaud had counselled a slow-down of production. Mr. A. Jeffers, an employee in the warehouse, also gave evidence that Mr. Dassy told him May 25 that Mr. Persaud had counselled a slow-down.

Messrs. Crawford, Gietka and St. Pierre had no reason to doubt Mr. Dassy's credibility at the time. The evidence that unfolded as to Mr. Dassy's character at the hearing in this Inquiry would raise very serious questions about his credibility to an objective observer on any contentious point. But the benefit of hindsight constitutes a different matter. Mr. Dassy was a productive worker, and while he had been disciplined for some incidents with other workers, including Mr. Bhardwaj, there was no record of problems between Mr. Dassy and Mr. Persaud in the previous four years. Moreover, management believed from their own contact with Mr. Persaud that he was opposed to the new standards and wanted to see them defeated. Mr. Crawford testified that he personally had seen Mr. Persaud drive into a zone and a few minutes later the employees in that zone would not be working. Mr. Lavis and Mr. Gietka both testified that Mr. Persaud had repeatedly opposed the standards at grievance meetings, and had said the company did not have the right to impose standards nor to discipline for failure to make standards. Mr. St. Pierre testified that his management team believed Mr. Persaud was trying to sabotage the standards. Messrs.

Crawford, Lavis, Gietka and St. Pierre all honestly believed Mr. Dassy's allegations. The evidence of Messrs. Floyd and O'Driscoll at the Inquiry confirmed that Mr Persaud was opposed to the standards, although he denied this in his own testimony.

As well, management was undoubtedly pleased to have a reason for terminating Mr. Persaud's employment given the many difficulties they encountered with him on a continuing daily basis in his role as Chief Steward.

There was no direct evidence suggesting a racial motivation in the termination of Mr. Persaud's employment. The Commission's own witnesses did not suggest the termination decision was motivated by racial considerations. I am asked to make the inference of a racial motivation from the circumstances. However, I accept the testimony of Consumers' management in respect of the termination. They honestly believed that Mr. Persaud had counselled a slow-down in an attempt to defeat the standards. Management was pleased to have a reason to be rid of Mr. Persaud, because they found him so unreasonable to deal with as a Chief Steward. I have no doubt in finding on all the evidence that Mr. Persaud was unreasonable and difficult to deal with as a Chief Steward in a businesslike manner. There was general frustration on the part of management with Mr. Persaud. The question remains - did Mr. Persaud in fact counsel Mr. Dassy to slow-down? Both Mr. Persaud and Mr. Dassy will say whatever seems convenient to them. Both are not credible as witnesses.

The more significant question is - should management have

acted on the uncorroborated evidence of Mr. Dassy in dismissing Mr. Persaud? Mr. Dassy's statement was supported by their own perception of Mr. Persaud's position in respect of the standards. Did this situation provide a reasonable and just cause for a termination of employment?

Whatever the answers to those questions, they are matters for resolution by arbitration as a labour dispute. This Board of Inquiry does not have (and was not given by the parties) the authority to give a decision in respect of the matter as a labour dispute. This Inquiry is limited to a determination as to whether there was a breach of the Code. There is nothing in the evidence, and I so find, to suggest any racial motivation on the part of management in respect of the termination of employment.

Mr. St. Pierre investigated Mr. Dassy's allegation, interviewing him for 30 to 40 minutes. Mr. Dassy was known to him only as a high producer and Mr. St. Pierre believed Mr. Dassy in part because his allegation accorded with the management team's opinion as to Mr. Persaud's views and commitment in respect of standards. Mr. St. Pierre did not interview Mr. Persaud nor did he make any inquiries to see whether there was any evidence other employees could provide one way or the other.

Mr. St. Pierre and others from Cosumers' management team met with Mr. Persaud and a union representative, Eugene O'Driscoll, May 29 at which time Mr. Persaud was told of the decision to terminate his employment (Exhibit #55). Mr. Persaud was then given the particulars of the basis for management's decision, being that

Article 6.01 of the Collective Agreement (which prohibits during the currency of the Agreement, "any strike...slowdown or any interference with work or production which shall in any way affect the operations of the Company") was violated by reason of "intimidation and pressuring Mr. Garry Dassy, amongst others, ...in slowing down production". (Exhibit #55).

Considerable evidence was given as to what happened at the meeting to advise Mr. Persaud of his termination. It is clear that management was communicating a decision already made. On the other hand, Mr. Persaud was told of the basis for the termination and was given the opportunity to respond and give his side of the story, but chose not to. Mr. O'Driscoll's evidence confirms this and he testified that even outside of the meeting that Mr. Persaud never told him his side of the story and never disclosed the names of any witnesses who might back him up. As well, as Mr. O'Driscoll testified, Mr. Persaud did not even offer any evidence in support of his position at the later grievance stages in respect of the termination.

Whatever the merits, or lack thereof, in respect of the matter of the termination of Mr. Persaud's employment, or of the process followed, there was no evidence supporting Mr. Persaud's allegation that the termination was founded upon a prohibited ground under the Code. There was no direct evidence and no circumstantial evidence to lead to an inference of unlawful discrimination. The evidence is to the contrary. Management honestly believed Mr. Dassy's allegations about Mr. Persaud, and as Mr. Persaud was a continuing

source of frustration in respect of most of their dealings with him, they were pleased to have a basis for terminating his employment.

There was no unlawful discrimination. As for Mr. Dassy's allegations, it is clear that he and Mr. Persaud had a dispute over Mr. Dassy's mode of picking. Mr. Persaud was undoubtedly critical of Mr. Dassy, and it is clear that Mr. Dassy retaliated by going to management to get back at Mr. Persaud. His motive was to hurt Mr. Persaud. Whatever Mr. Persaud may have said to Mr. Dassy about his "picking", Mr. Dassy was going to retaliate for the criticism made of him. Mr. Dassy's retaliation was not racially motivated, and (unlike the Bhardwaj incident) there were no racial slurs accompanying his May 25 verbal altercation with Mr. Persaud. Mr. Dassy was not trying to assist management, and he certainly was not intimidated by Mr. Persaud. After observing Mr. Dassy at this hearing, it can be said that no one intimidates Mr. Dassy easily.

Neither Mr. Dassy nor Mr. Persaud are credible witnesses. Both will say whatever is convenient to their own self-interest. At the time of the termination, the management of Consumers had no reason to doubt Mr. Dassy. As well, they did not want to doubt Mr. Dassy. They knew Mr. Persaud well, and Mr. Dassy's allegations supported their impression of Mr. Persaud's seeking to defeat the success of the productivity standards. One can certainly fault management for acting upon the uncorroborated allegations of one witness (and a witness who, in hindsight with the benefit of this Inquiry, can be seen to be completely lacking in credibility), but

there is no doubt that there was no motivation present for the termination in terms of a prohibited ground of the Code.

There was no credible evidence that the decision-makers in respect of Mr. Persaud's termination, Mr. Gietka and Mr. St. Pierre, or any other member of Consumers' management team, discriminated against Mr. Persaud on a prohibited ground or engaged in any conduct towards any employee on a prohibited ground. The union officials, Mr. Floyd, Mr. O'Driscoll, and Mr. Joe Bigeau, realized and testified that management's dislike of Mr. Persaud had nothing to do with his colour or racial origin, but rather because Mr. Persaud was extremely frustrating to them in their dealings in respect of labour activities. The union, as well as the company, had to deal with the problems of Mr. Persuad's disruptive approach to meetings, repetitive grievances without merit, and uncooperative approach. Mr. Floyd testified that Mr. Melynchuk sometimes used inappropriate and unacceptable comments, such as "jungle bunnies" and "turban heads", in private meetings between the two, but apart from this, all the company and union witnesses, including Mr. Floyd, stated with reference to Mr. Persaud that Mr. Melynchuk's behaviour was exemplary. Mr. Floyd stated that "If I was the company faced with that joker, I would have been frustrated". Mr. Floyd did suggest that there may have been some historical problems at Consumers in respect of management's dealings with employees of visible minorities, but this was prior to the management team in place headed by Mr. St. Pierre at the times relevant to the issues in this Inquiry. Even the historical problems seem to have centred

upon labour matters. The management in place before Mr. St. Pierre's team seems to have been motivated mainly in obtaining a work force cheaply with little concern for matters such as working conditions or workers' welfare. Mr. Floyd testified that "...had John Persaud conducted himself to the company's guidelines, he would probably still be working there today". On all the evidence, I find that there was no contravention of section 4(1) of the Code in respect of the termination of Mr. Persaud's employment.

Mr. Persaud alleges in paragraph #16 of his Complaint that he was unlawfully harassed in contravention of section 4(2) of the Code. There was no evidence of racial harassment of Mr. Persaud by Mr. Dassy or any other employee. As discussed in respect of the Bhardwaj Complaint, discrimination by harassment amounts to a condition of employment for which the employer is liable, being in breach of the Code, if the employer stands by idly in the knowledge that his employees are using racially abusive language. The employer must know, or should reasonably have known, of the continuing harassment for the harassment to amount to a condition of employment.

Ms. Gail Guttentag of the Ontario Human Rights Commission made a review of past human rights complaints at Consumers and visited the distribution centre, resulting in an "impressionistic snapshot" on her part of race relations problems at Consumers. She did not do any empirical research, and her impression was based only upon existing complaints. The sketchy notes of her interviews with two human rights officers (Exhibits #116 and #117) refer to problems

primarily relating to labour relations rather than race relations. In any event, her basis of information did not relate to the current environment at the warehouse over 1983 and 1984 but was based upon information relating to an earlier period of time. There was no evidence in the Inquiry of pervasive race relations problems through name-calling. There was evidence given to the Inquiry of some problems of racial name-calling between employees, but it was on an isolated and occasional basis. There was also graffiti in the washrooms which, while primarily directed against the company, was also racial. The washrooms were regularly cleaned and painted. The isolated instances of name-calling, apart from the Bhardwaj incident, were not reported to management.

Neither the evidence of isolated instances of name-calling nor the evidence of incidents and altercations between employees can support an inference of a racially poisoned and oppressive work environment as a term and condition of employment. Management took steps to address the specific problems of name-calling when they were brought to their attention. Management made it clear that racial name-calling would not be tolerated and responded with discipline upon the offenders. On all the evidence, it is clear there was no harassment in the workplace in respect of Mr. Persaud in contravention of section 4(2) of the Code for which the Respondent, Consumers, is responsible. Even if there had been racial harassment by Mr. Dassy of Mr. Persaud (on the evidence there was not) Mr. Dassy was not an individual Respondent to the Complaint of Mr. Persaud and for the reasons given above in respect

of the Bhardwaj Complaint, Consumers, as an employer, would not have been in breach of the Code, given the circumstances.

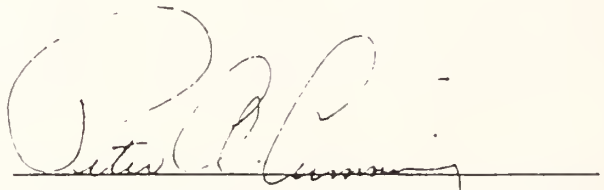
For the reasons given, the Complaints of Mr. Bhardwaj and Mr. Persaud as against Consumers are dismissed. For the reasons given, I find for Mr. Bhardwaj in respect of his Complaint against Mr. Dassy.

ORDER

For the reasons given, having found that the Respondent, Gary Dassy, was in breach of section 4(2) of the Human Rights Code, 1981, as amended,

1. IT IS HEREBY ORDERED that the Respondent, Gary Dassy, pay forthwith to the Complainant, Davinder Bhardwaj, the sum of fifteen hundred ($1,500.00) dollars as general damages.

Dated at Toronto October 11, 1990.



Peter A. Cumming